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Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element

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ARTICLES

PUBLICATION RULES IN THE RULEMAKING SPECTRUM: ASSURING PROPER RESPECT FOR AN ESSENTIAL ELEMENT

PETER L. STRAUSS*

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INTRODUCTION

Imagine a visitor who seeks to catalog the variety of written texts American government uses to communicate its powers and its citizens' rights and obligations. She might organize those texts into the following pyramid:

* Betts Professor of Law, Columbia University School of Law. I am fortunate to owe intellectual debts not only to many scholarly colleagues—Robert Anthony, Cynthia Farina, William Funk, Ronald Levin, Gerald Neuman, John Manning, Henry Monaghan, Todd Rakoff and Roy Schotland—but also to lawyers from government and private practice, who as members of the ABA's Section on Administrative Law and Regulatory Practice have attended the growth of these ideas over their long gestation. I will mention here Daniel Cohen, Neil Eisner, Ernest Gellhorn, Jeff Lubbers, and Randolph May, knowing I may have slighted others. Any inaccuracies and faults in this paper are entirely my own.

A Constitution, adopted by "the people"

Hundreds of statutes, adopted by an elected Congress

Thousands of regulations, adopted by politically responsible executive officials

Tens of thousands of interpretations and other guidance documents, issued by responsible bureaus

Countless advice letters, press releases, and other statements of understanding, generated by individual bureaucrats

On inquiry she would find that we understand passably well the ordering and influence of the top three layers of this structure. Our legal system treats each of them as binding text, subject only to the requirements that it be authorized by the superior authority and appropriately adopted following designated procedures; if valid, each of them has legislative effect on government and citizen alike, until displaced by another text validly adopted at the same or a higher level. She would find, too, that the innumerable items at the base of this pyramid, while often in fact influential on private conduct, are denied any formal jural effect. It is at the fourth level that she would find confusion—confusion whether these "publication rules," as we will call them for reasons that will presently appear, are legitimate instruments of agency policy or a ruse to evade the higher procedural obligations associated with adopting regulations;¹ confusion whether an agency may give them any jural effect and, if so, to what degree; and confusion whether and to what extent they must be respected by the courts.

Publication rules—interpretative rules, statements of general policy, staff manuals, and the like—are an important element in the hierarchy of agency law. Undoubtedly, rules within the meaning of the Administrative Procedure Act (APA),² they are generally adopted at staff levels within an agency to guide both staff conduct and public knowledge, without following the notice-and-comment procedures of section 553 of that act.³ If they have been published, however, sections 552(a)(1) and (2)⁴ of the APA permit agencies to rely upon them in their dealings with the public. Publication rules include the advice the Internal Revenue Service (IRS) publishes, telling the public how it interprets IRS statutes and regulations; regulatory guidance the Food and Drug Administration (FDA) or the

1. This article uses the word "rule" to connote any action meeting APA Section 551's definition of "rule," and the word "regulation" to signify a rule that is adopted following section 553's notice-and-comment procedures, that must be published in the Federal Register and that, if valid, has the effect of a statute on all actors.

2. See 5 U.S.C. § 551(4) (1994).

3. See *id.* § 553. Staff offices preparing publication rules frequently do tell those likely to be affected that they are doing so, and provide an opportunity for exchange, but not within the formal structures of section 553. See *infra* note 128.

4. See *id.* § 552(a)(1)-(2) (1994 & Supp. V 2000).

Federal Aviation Administration (FAA) provides for manufacturers subject to their regulation, spelling out detailed courses of action the agency's staff has decided it will accept as establishing compliance with FDA or FAA regulatory requirements; and manuals the Occupational Safety and Health Administration (OSHA) issues to its inspectors, instructing them how to perform inspections and how to respond to particular conditions they may find—by seeking a fine, by asking for correction, and so forth.

These rules are common and generally salutary forms of informal agency action in use well before the Administrative Procedure Act was enacted in 1946,⁵ and their volume greatly exceeds that of notice-and-comment regulation. To take just one example, consider the facts revealed in *National Automatic Laundry & Cleaning Council v. Shultz*,⁶ written three decades ago by Judge Harold Leventhal of the D.C. Circuit. He learned that each year the U.S. Department of Labor's Wage and Hour Administration responded to 750,000 requests for advice about the interpretation and application of the Fair Labor Standards Act; 10,000 of these responses were signed by the Administrator herself and the rest, by staff. These advisory letters were interpretative rules, Judge Leventhal concluded. The question he had to decide was whether the letter before him was "final agency action" ripe for review.⁷

When the author of this article was General Counsel of the Nuclear Regulatory Commission in 1975-77—the years, readers may recognize, just preceding the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁸—any regulation the Commission adopted was considered, often in detail, by the five Commissioners themselves. These Commission regulations generally set performance standards for nuclear safety, as even then was thought preferable, rather than specify the details of design—a difference often identified in the literature as that between having "standards" and having "rules." The bulk of the work for one of the Commission's five bureaus was continually to generate guidance for license applicants and others about technical design issues raised by these regulatory standards. It issued this guidance in a volume dwarfing the regulations; and these guidance instruments, which the Commission expected to be the product of informal consultation by responsible staff with affected parties, were supervised by the Commission in only a general way. Another bureau, in charge of

5. See, e.g., *Helco Prods. Co. v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943), distinguished in *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967); *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698-700 (D.C. Cir. 1971).

6. 443 F.2d at 691-92.

7. See *infra* Part II.

8. 435 U.S. 519 (1978).

inspections and enforcement, produced copious guidance for the Commission's inspectors. Both sorts of guidance, understandably, were earnestly sought out by those the Commission regulated, and greatly influenced their conduct. From an internal perspective the guidance also contributed to the discipline of staff action, its predictability and regularity. Comparable practices and proportions, in response to similar levels of public demand for guidance and central agency interest in controlling a farflung staff, can be found at many, if not all, regulatory agencies. The result is an enormous output of publication rules, far greater than the pages of the Federal Register, and (in proportional terms) rarely challenged in litigation.

The provisions of the APA appear straightforwardly to acknowledge the existence of publication rules and provide minimal procedures to govern their adoption. The APA's section 553, which defines notice-and-comment procedures for regulations, has from the beginning excepted from those procedures all "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."⁹ Since the Freedom of Information Act was first enacted in 1966, section 552(a)(2) of the APA has provided that "[a] final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if" it has been published and indexed as the statute provides, or the party has had actual and timely notice of it. The Congress that enacted this language was aware of the importance of publication rule practice and chose *only* the requirement of publication as its legislative response; putting an end to secret law, not additional proceduralization, was its aim.¹⁰

9. 5 U.S.C. § 553(b)(A) (1994).

10. See S. 1160, 89th Cong. (1965).

[S]ubsection (b) of S. 1160 would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the [unamended APA] these Federal agency decisions have been kept secret from the members of the public affected by the decisions.

. . . This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available However, under S. 1160 an agency may not be required to make available . . . any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases.

....

Subsection (b) would help bring order out of the confusion of agency orders,

Just as the D.C. Circuit encrusted notice-and-comment rulemaking procedures with judicial “innovations” before the *Vermont Yankee* opinion emphasized its obligation to respect the decisions made by section 553, in recent years that court—seeing only those cases citizens have cared to litigate—has repeatedly required increasing formalization of publication rulemaking, and done so without any attention to the provisions of section 552(a). Cases in that circuit now require the use of notice-and-comment rulemaking to set enforcement policy if knowledge of that policy might be expected inevitably to shape private conduct.¹¹ Other cases reason that once an agency has used a publication rule to interpret its regulations, any further differing interpretation may be adopted only by the use of notice-and-comment rulemaking. The most recent of these cases give this formality-triggering characteristic to actions taken by staff in one distant region; the consequence of doing so is effectively to forbid the agency’s central administration from ever itself issuing an interpretive rule.¹² Yet another case appears to go out of its way to denounce the practice of using publication rules, as if such rules were characteristic of lawless agency maneuvering.¹³

opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents having precedential significance

. . . As an incentive to establish an effective indexing system, . . . no agency action may be relied upon, used, or cited as a precedent against a private party unless it is indexed or unless the private party has adequate notice of the terms of the agency order.

H.R. REP. NO. 89-1497, at 7-8 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2424-25. No controversy appears respecting the language of the Senate bill, which had previously been adopted by the Senate and was adopted without amendment by the House.

11. See *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987), *discussed in* Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131 (1992); *see also* *Chamber of Commerce v. U.S. Dep’t of Labor*, 174 F.3d 206 (D.C. Cir. 1999), *discussed in* Theresa Titolo, Comment, *The Aftermath of Chamber of Commerce v. U.S. Dep’t of Labor and Its Implications for OSHA Reform* (unpublished manuscript, on file with author).

12. See *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *see also* *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Both cases are discussed in Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000) and Jon Connolly, Note, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155 (2001). A different, and less problematic, proposition is that where a regulation has embodied the interpretation of a statute, an agency can change that *statutory* interpretation only by amending the regulation by further notice-and-comment rulemaking, and not by issuing an interpretive rule. *See Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 231-32 (D.C. Cir. 1992).

13. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000); *see also infra* note 86.

It is not hard to find considerations supporting the outcomes of these decisions. Private parties may have acted in reliance on an understanding about the state of the law which a publication rule subsequently undercut. The notorious ossification of notice-and-comment rulemaking in recent years, a response to the minority of regulations having major economic impact, has greatly increased its cost at the same time as agencies have experienced increasing stringency in the resources available to them. The more costly it becomes to generate regulations, and the fewer resources agencies have available to pay those costs, the greater will be the temptation to find other means to generate policy—shortcutting a desirable, even necessary public process.¹⁴ The contested cases sometimes appear to result from clumsy lawyering or overreaching claims in court on the agencies' part. If an agency has instructed its inspectors to file complaints when they find certain precise factual conditions that agency higher-ups have concluded signal a violation of a standard embodied in its regulations, inspectors may carelessly allege the existence of the factual conditions, rather than a violation of the standard, as the basis on which they seek a fine. When these interpretations are challenged in court, the proliferation of rules seeming to require courts to accept agency interpretations as binding upon them may encourage agency lawyers to claim more deferential ground for their client than they wisely should.

Without wishing to deny that these forces are at work, this Paper draws its orientation from the explicit provisions of the APA and from the proposition that the precedential force it permits interpretive and policy documents is grounded in sound policy considerations. Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law. Citizens are better off if they can know about these instructions and rely on agency positions, with the assurance of equal treatment such central advice permits, than if they are remitted to the discretion of local agents and to "secret law." Particularly in a society that has come to believe standards are a better instrument of regulation than detailed command-and-control rules, even an ideal level of rulemaking will generate an enormous range of issues on which interpretation and policy analysis will be required. These are the predominant occasions for publication rulemaking, and the resulting publication rules very rarely reach the courts.

In discouraging the use of these rules or making it more expensive, the judicial responses threaten important sources of information for citizens

14. Concrete measures of the phenomenon are hard to come by, though claims that the temptation is being yielded to are frequent. For one thoughtful effort at measurement, see Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 168 (2000).

and important encouragements to agency regularity and even-handedness. As the House Committee remarked on reporting what is now APA section 552(a)(2) to the floor,

This material is the end product of Federal administration. It has the force and effect of law in most cases

. . . [E]mbodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. . . .

. . . .

Subsection (b) would help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents having precedential significance

. . . As an incentive to establish an effective indexing system, . . . no agency action may be relied upon, used, or cited as a precedent against a private party unless it is indexed or unless the private party has adequate notice of the terms of the agency order.¹⁵

Changed approaches, moreover, are particularly likely after the inauguration of a new president, who will believe he has won a mandate to use executive power in a manner different from his predecessor. Unless the prior interpretations were put in place by regulation,¹⁶ characterizing these changes as lawless maneuvering begs important questions about what a change in administration means. It seems at least contestable whether, if President Clinton's was the first administration informally to interpret an agency regulation, that fact condemns President George W. Bush's and all succeeding administrations to do their interpreting by notice-and-comment rulemaking. These are the premises on which this Paper proceeds.

This topic is hard to write about. This is, in part, because so many relationships are involved: the legislature, the courts, an agency, the various staff offices within the agency, and the citizens subject to agency action. Within each of these relationships lie possibilities both of control and of influence that we must explore. Difficulties also arise out of doctrinal considerations—issues of reviewability, such as finality and ripeness, need to be kept distinct from questions about required procedure, and these in turn differ from the issue of what standards of review are appropriate. Within the framework of the standard of review question lurks issues about

15. H.R. REP. NO. 89-1497, at 7-8 (1966), *reprinted* in 1966 U.S.C.C.A.N. 2418, 2424-25.

16. *See Nat'l Family Planning*, 979 F.2d at 231.

whether executive decisions respecting enforcement are reviewable at all,¹⁷ knotty problems of government estoppel and agency non-acquiescence; the application and meaning of the Supreme Court's protean decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁸ the Court's recent revival of attention to *Skidmore v. Swift & Co.*,¹⁹ in *Christensen v. Harris County*,²⁰ and *United States v. Mead Corp.*,²¹ the *Chevron*-analogs for reviewing agency interpretations of regulations, *Bowles v. Seminole Rock & Sand Co.*,²² and *Stinson v. United States*,²³ and the Court's usual insistence, respecting statutes, that once it has spoken on an interpretive question, the result can be changed only by statute.²⁴

The analytic tools commentators employ can also be misleading. The anthropomorphic tendency to treat agencies as if they were a single human actor is particularly distracting and distorting when one is analyzing a medium that the constituent elements of complex institutions use to speak to each other.²⁵ Moreover, discussion sometimes proceeds as if the issue to be examined is whether agency actions are "binding" or not—as if there

17. See *Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

18. 467 U.S. 837 (1984).

19. 323 U.S. 134 (1944).

20. 529 U.S. 576 (2000).

21. 121 S. Ct. 2164 (2001).

22. 325 U.S. 410 (1945).

23. 508 U.S. 36 (1993). *Accord* *Udall v. Tallman*, 380 U.S. 1 (1965).

24. See, e.g., *Neal v. United States*, 516 U.S. 284, 295 (1996), discussed in *United States v. Mead Corp.*, 121 S. Ct. at 2182 (Scalia, J., dissenting).

25. In a widely publicized recent brouhaha, an OSHA official responded by letter (two years late) to an inquiry whether employers would be responsible for dangerous conditions in workers' homes, if they had their employees work at home. He indicated a view that they would. Subsequently, this letter was made generally available by posting it on the OSHA web site. It was found there by another employer, who caused an eruption of congressional and public criticism that led to the withdrawal of the letter and its eventual replacement by the opposite interpretation—now with the imprimatur of not only OSHA's Administrator but also the Secretary of the Department of Labor. See Randolph J. May, *Ruling Without Real Rules: Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. (forthcoming Dec. 2001).

From a certain perspective, this is a success story about the use of publication rules. It would be unreasonable to think that the first moves were the "agency's" acts in a strongly descriptive sense. They occurred at relatively deep staff levels. The subsequent developments indicated both the availability of internal review and its effectiveness in a case of significant controversy. That the agency was willing to provide advice, that initial advice in response to individual inquiry constituted a step distinct from advice to the public at large, and that advice to the public could be taken up the chain of command for effective review, all seem highly desirable features. Worlds without advice, or without distinctions as to the seriousness and breadth with which it is offered, or without internal checks on its accuracy, would seem quite a bit less desirable.

were only two choices. The APA, however, describes the permitted legal force of agency actions in three ways: actions validly adopted pursuant to congressionally authorized rulemaking procedures have the kind of authority we commonly ascribe to statutes; actions that meet the publication requirements of section 552(a) have such authority as we commonly ascribe to precedents; and in other cases, agencies are not permitted to treat their actions as having legal force on citizens. Echoing *Skidmore*, the recent *Christensen* and *Mead Corp.* decisions similarly remind us that there are in fact three possibilities—not only control and irrelevance, but also influence. Keeping in mind the statutory recognition of influence, of precedential force, considerably aids analysis.

A student analysis of one of the recent D.C. Circuit cases remarked on an ongoing tension between the Supreme Court and that court, as both have

struggled to balance some measure of restraint and accountability with efficiency in defining the proper power and scope of agency rulemaking. But while the Supreme Court has increasingly moved towards a more “hands off” approach, trusting the political process to ensure agency fairness, the D.C. Circuit has maintained a much more skeptical stance toward agency discretion.²⁶

Almost a quarter century ago, the Supreme Court spoke to that tension in *Vermont Yankee*, forbidding that court from overriding the procedural instructions of the APA’s specification of notice-and-comment procedures for rulemaking. If we could imagine a similar outcome grounded in the APA’s express recognition that agencies are permitted to rely upon their publication rules, what might that instruction look like? The pages following suggest a set of principles whose observance could avoid what is now a considerable threat to one of the major protections administrative law offers against arbitrary government:

- 1) Section 552 permits agencies to give publication rules precedential effect, reflecting the values both of effective supervision of the bureaucracy and of providing reliable notice to the public of agency policies and understandings.
- 2) Centrally generated publication rules likely to significantly affect private conduct are ordinarily “final agency action” subject, if ripe, to judicial review.
- 3) In reviewing a publication rule, courts need give only *Skidmore* weight to an agency’s determination that its existing statutes and regulations authorize that rule.

26. Connolly, *supra* note 12, at 162 (citing Thomas, *supra* note 11, at 131).

4) In determining whether an agency's existing statutes and regulations authorize a publication rule, a court may consider whether the agency's regulations fail to articulate important policy conclusions it could reasonably have been expected to reach. Any conclusion that an agency's regulations are insufficiently specific in some particular, however, must be made in the context of the agency's array of statutes and regulations as a whole, and the predictable importance of that particular to the agency and those it regulates in the context of its general responsibilities.

5) Agencies may freely revise publication rules, subject to the usual constraint of having to justify changes in policy.

I. A FRAMING CASE: *HOCTOR V. U.S. DEPARTMENT OF AGRICULTURE*

The relatively simple facts of *Hector v. U.S. Department of Agriculture*²⁷ can help to frame the discussion. Hector had a game farm near Terre Haute, Indiana, where he raised lions, tigers, and other big cats. The Animal Welfare Act of 1966 required the licensing of his operations by the U.S. Department of Agriculture (USDA). That Act authorized the Secretary "to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the Act]"²⁸ and to develop standards "to govern the humane handling, care, treatment, and transportation of animals by dealers"²⁹ These standards must include minimum requirements "for handling, housing, feeding, watering, sanitation," etc.³⁰ The Department has adopted many regulations over the years—sometimes quite detailed (as in the case of dogs, cats, hamsters, and the like), but for less commonly raised and exhibited animals like Hector's, they are more general. For example, 9 C.F.R. § 3.125(a), which governs the required structures for housing those animals, provides:

The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

Plainly, this does not tell Hector exactly what to do—how high, for example, to build a perimeter fence around his property that will keep his lions and tigers out of the surrounding schoolyards and cattle lots.³¹ It only

27. 82 F.3d 165 (7th Cir. 1996).

28. 7 U.S.C. § 2151 (1994).

29. *Id.* § 2143(a)(1).

30. *Id.* § 2143(a)(2)(A).

31. The assumption here, as in *Hector*, is that the Secretary was authorized to adopt

tells him what tests he will have to meet, and if he wants more detailed information he will have to get it elsewhere.

Subject to vagueness concerns, this characteristic is not a failing of the regulation, but an asset. The difference between rules and standards is commonplace in the literature, and the consensus is that standards are preferable. Almost twenty years ago, Colin Diver wrote a magisterial article with an evocative title: *The Optimal Precision of Administrative Rules*.³² That title nicely fits a theme of recent writings about regulatory reform—that detailed, central, top-down command structures, in which Washington bureaucrats tell citizens exactly how to build a ladder or in other ways order their lives, have proved ineffective and inefficient. The better way is to set a standard that the citizen is obliged to meet, and to leave it to the ingenuity of the citizen to decide exactly how to do so. Of course, the *Hector* standard could have been a better one.³³ The Department might, for example, have added:

A structure is in violation of this rule if found insufficient to prevent escape by an average animal of the species contained therein.

This addition would give more information about how one could identify a violation, but it would still be a standard, not a rule.

Essential to this discussion is the proposition that, despite this characteristic, section 3.125(a) of the C.F.R. is a valid regulation, and unless its standard is so vague as to leave ordinary persons at sea about what is being required of them, the Department may sanction people who violate it.³⁴ To preclude the Department's approach and require it to enact species-specific detail would be to reject, pro tanto, the preference for standards. Preclusion might also inflict an unsustainable expectation of foresight or detail on agency rulemakers—as if they must anticipate just what animals are to be contained, what range of physical characteristics each possesses, and other such information much more readily at hand to (and properly demanded of) the animals' keepers than the Department's central bureaus. In worlds of regulation intensely more technological and

containment rules to protect the surrounding environment from the animals being contained, as well as vice versa. As Judge Posner intimated, one could question whether an "Animal Welfare Act" in fact authorizes such rules. See 82 F.3d at 168-69.

32. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65 (1983).

33. Considerations of equal protection or due process arguably govern the precision required of standards, as for example judicial standards for assessing the clear intent of a voter. See *Bush v. Gore*, 531 U.S. 98, 105-09 (2000); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 669-70 (1996).

34. Cf. Manning, *supra* note 33, at 669-70, 670 n.281.

safety-oriented than the USDA's supervision of wild animal farms—say, nuclear power plant regulation, or airframe approval—the regulations for which the politically accountable leadership is responsible consistently frame standards, which are then elaborated in detail by regulatory guidance documents generated by engineering staffs, usually after informal exchanges with the regulated industry. It is not, then, a proper complaint about the USDA's performance that its regulations failed in terms to require eight-foot perimeter fences for big cats, rather than a "facility . . . constructed of such material and of such strength as appropriate for the animals involved . . . structurally sound and . . . maintained in good repair to protect the animals from injury and to contain the animals."³⁵

Still, it will be helpful to the Hectors of this world, and to the inspectors who patrol their compliance with rules like these, if safe harbors can be defined. From an agency perspective, uniformity of administration nationwide is desirable and the agency may doubt whether its pool of not-so-well-paid inspectors will be able to handle so much discretion. Adopting regulations would require the time of the agency's limited top-level management and costly formality to create or alter. If the top of the agency's hierarchy is not the place for generating species-by-species cage-and-fence detail, a central, responsible staff office may be. Having regulations that set standards virtually requires the emergence of advice to tell game park owners and departmental inspectors alike what kind of fence will be regarded as "structurally sound" to contain lions and tigers. Periodic advice from a responsible staff office can provide those who are disposed to cooperate with regulation with a framework for achieving compliance efficiently and confidently. It can create a framework for staff advice and enforcement that enhances both the agency's internal discipline and the regularity and equal treatment citizens experience.

In light of APA section 552(a), this advice can take a variety of forms. One can imagine five different ways in which Hector might have discovered the Department's specific judgment:

1) He might have found an interpretive rule stating that "facilities . . . structurally sound . . . to contain the animals," requires that big cats be enclosed in an eight-foot perimeter fence.

2) He might have found a policy document announcing that the Department had decided on the basis of recent studies and literature to seek fines and

35. Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals, 9 C.F.R. § 3.125(a) (2001).

other sanctions against licensed dealers whose facilities for big cats lacked eight-foot perimeter fences.

3) He might have found an inspector's manual directing the Department's inspectors to accept eight-foot perimeter fences as complying with the regulation, and/or to issue citations to dealers with lower or absent perimeter fences.

4) He might have found prior administrative adjudications deciding that the structural standard was met by eight-foot perimeter fences but not by seven-foot perimeter fences.

5) When seeking his license, he might have asked a local Department veterinarian, lacking further guidance from above, what height of perimeter fence would meet the regulation.

Note that this Paper, here as elsewhere, treats all publication rules alike. Section 552(a) does not distinguish among interpretative rules, general statements of policy, or staff manuals (or, for that matter, agency adjudicative precedent). The D.C. Circuit³⁶ and some commentators have devoted considerable effort to distinguishing among these forms.³⁷ Rather than distinguish among the forms, this Paper prefers to distinguish between two different settings in which agencies may try to use any of them: in the first setting, the publication rule purports to draw on some existing source of agency legal authority, statute and/or regulation; in the second, it does not. Todd Rakoff has persuasively characterized the difference between American and Japanese informal procedure as being, precisely, that Japanese administrative law contemplates legitimate informal agency action, what the Japanese term "guidance," that is concededly beyond the reach of direct statutory or regulatory requirements, while American administrative law does not.³⁸ The question of authority is central to the analysis being offered here. Nothing said should be taken to suggest that a publication rule can have the influence permitted by section 552(a), in the

36. *E.g.*, *Hudson v. FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999) (citing *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997)). As in *Hudson*, further discussed *infra* at pp. 821-22, the D.C. Circuit's distinctions may be the product of understandable efforts to limit the harm done by other panels' questionable holdings about "interpretative rules;" the alternative, under current practice, would be to force en banc consideration of the issue, a procedurally and politically costly step.

37. See Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 10 (1994) [hereinafter Anthony, *Lifting the Smog*]. See generally Pierce, *supra* note 12.

38. See Rakoff, *supra* note 14, at 168-69.

absence of some such relationship to a superior norm. Whichever form it takes, its permitted influence depends on its reasonable relationship to requirements enunciated in statute or regulation, which the publication rule serves to make more concrete in particular circumstances.

This defining characteristic also eliminates any need here to plumb other issues of definition that have plagued some discussions.³⁹ Regulations can only be made by using notice-and-comment rulemaking or qualifying for one of the exceptions to section 553 of the APA that permits agencies to claim the force of statutes for their rules even if those procedures have not been used. Nothing in the APA permits an agency to claim legislative force for a publication rule. If an agency wishes to claim that force for a rule, section 552 is simply beside the point. If it does not claim that force for a rule, if it simply asserts that it may rely on its previously announced rule in dealings with citizens premised on authority or regulatory commands elsewhere grounded, then section 553 is irrelevant. It may well be that such announcements will contribute to significant changes in private conduct; but if it is not the announcement itself that the agency relies upon should it attempt to command those changes, the fact of such reliance is no more than section 552 anticipates. A bit more care from agency counsel about the precise source of authority an agency is claiming, within the agency and, especially, when judicial review is sought, could work wonders.⁴⁰

As Judge Posner reported the facts, Hctor chose the fifth of the routes listed above—the one that will prevail when an agency has *not* used publication rules, and consequently the one that leaves matters to the discretion of an uninstructed street-level bureaucrat. In 1982, an inspecting Department veterinarian told Hctor that to get a license he would have to build a six-foot perimeter fence around his whole property, in addition to pens for the big cats and a containment fence around their immediate area. Hctor built all of these and was licensed. In 1983, the following year, the Department added a provision to the manual it uses to instruct its inspectors, telling them to apply an eight-foot standard for perimeter fences

39. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108-09 (D.C. Cir. 1993). See generally *Pierce*, *supra* note 12.

40. See *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000). This may be easier said than done, of course. An experienced correspondent, who directs the legal office responsible for regulation in a department with many rulemaking bureaus, wrote after seeing a draft of this paper,

The problem of tying a violation to an agency handbook (even internal ones) rather than a rule, as you note . . . is more common than it should be. No matter how many memos the General Counsel or I put out, no matter how often we raise it in training courses, I still hear "the [non-notice-and-comment] guidance manual requires it."

E-mail (Jan. 11, 2001) (on file with author).

for dangerous animals under its containment standard. It was not until seven years later, in 1990, that "Hector was cited by a Department of Agriculture inspector for violating . . . the housing standard, by failing to have an eight-foot perimeter fence. Eventually the Department sanctioned Hector for this and other alleged violations, and he . . . sought judicial review limited . . . to the perimeter fence."⁴¹

Although Judge Posner did not address it specifically, this element of reliance on local official advice in making an expensive investment complicates the analysis, and in my judgment tends to explain the cases fairly well. This turns out to be another of those contexts in which courts have struggled to free citizens from the death grip of the rule that the government cannot be estopped by the errors of its agents. But for the moment it will be useful to focus on the first four of these possibilities—interpretive rules, statements of general policy, staff manuals, and decisions in adjudicated cases—by which the Department's view might be elucidated.

II. FINALITY AND RIPENESS

Judge Posner did not have to consider the reviewability of the manual provision at issue in *Hector*, because the case before him involved a concrete application of the understanding reflected there to impose a fine on a citizen. If the Department had given excessive jural force to its manual provision, treating it as if it were a regulation, the order imposing that fine—undoubtedly it was both final agency action and ripe for review—should be reversed. In other cases, however, citizens or the regulated may wish to challenge the validity of a publication rule in advance of its concrete application. As in the case of a regulation, in some circumstances conformity may be so simple, and the consequences of disregarding a publication rule that would be upheld may be so severe, as to make those who learn of a publication rule unwilling to take the risk of its concrete application to them. Unless able to challenge it in advance of its application, they will follow the course it counsels, and its validity will never be assessed. In other circumstances, those who are the objects of regulation may welcome a publication rule, that members of the public believe inadequately protective of their interests; again, because the regulated will comply, there will never be a concrete application of the rule that could be tested on judicial review. This, for example, was the setting in *Community Nutrition Institute v. Young*,⁴² where the FDA had issued enforcement guidelines setting a tolerance level for aflatoxin, a naturally occurring carcinogen unavoidably associated, to some degree, with corn;

41. *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 168 (7th Cir. 1996).

42. 818 F.2d 943 (D.C. Cir. 1987).

the guideline instructed its inspectors not to interfere with corn shipments having a lower aflatoxin level. This created a safe harbor grain merchants warmly desired. However, the Community Nutrition Institute believed that the harbor was in fact not safe for the corn-consuming public and successfully challenged its adoption as a publication rule rather than a regulation.

The reader may already have grasped that permitting review of publication rules prior to their application presents all the considerations associated with the Supreme Court's opinion, increasingly controversial in some quarters, in *Abbott Laboratories v. Gardner*.⁴³ Similarly, permitting review at the behest of those not subject to the rule raises ripeness controversies parallel to those that have sharply divided the Supreme Court and commentators in other settings in recent years.⁴⁴ This is not the place to explore those controversies as they arise in the context of regulations produced by notice-and-comment rulemaking procedures. It is, however, necessary to address some additional considerations that can be adduced concerning publication rules. In addition to the arguments against the pre-application reviewability of regulations, one may also marshal the structural contingency of any publication rule. Unlike a regulation, which enjoys statutory effect and can be altered only by the relatively formal procedures of notice-and-comment rulemaking, a publication rule is merely influential; it can be freely altered at any point before it has been concretely applied—and, indeed, the agency issuing it must be prepared to treat it as provisional, in the sense that it must permit arguments for its alteration to be made in any proceeding to apply it. Whether, then, it is properly regarded as a “final agency action” is a more difficult question than appeared in *Abbott Laboratories*.

Important to the resolution of that question, moreover, are two additional considerations that tend to defeat conclusions for reviewability. First, and associated with the contingency of a publication rule's proposition, would be understandings about the value, volume, and provenance of many such rules. Knowledge of an agency's interpretations, policies, etc., is a positive good, and voluntary agency creation of publication rules, therefore, ought not be discouraged—as the prospect of easy review might tend to do. Moreover, given the volume at which publication rules appear relative to regulations, it is likely that most, if not all, will be generated at agency staff

43. 387 U.S. 136 (1967). See, e.g., Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 89-91 (1995); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 246-47 (1990).

44. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *Reno v. Catholic Soc. Servs.*, 509 U.S. 43 (1993); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1447 (1988).

levels that make ascribing “finality” to them questionable within the agency’s own hierarchy; higher officials, that is, will rarely have had any occasion to consider and ratify the merits of the positions taken. Second is the frequent association of publication rules with questions of enforcement policy. Decisions about the allocation of agency resources and effort—viz., what concentration of an inevitable carcinogen in corn should lead agency inspectors to condemn a shipment as contaminated—are among the most frequent subjects of publication rules. Given the mischief secondary disputes about why an agency is doing this, rather than that, could wreak, the Supreme Court has said, judgments of that character are presumptively unreviewable.⁴⁵ Agency resources are already scarce, inevitably requiring such allocations. Permitting judicial review of them consumes more of those resources and may delay other work.

Considerations like these animated Judge Leventhal’s decision in *National Automatic Laundry & Cleaning Council*, already briefly discussed.⁴⁶ He concluded that the advisory letters in that case were interpretative rules. The question he had to decide was whether the letter before him was “final agency action” ripe for review. On the one hand, it was important not to “discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue”⁴⁷ through making all such advice reviewable; on the other hand, the 10,000 signed by the administrator and “published” had a prominence that lay within the agency’s control; they were adopted at the highest levels in the agency, and the possibilities for private enforcement of the act practically bound the inquirer and others to pay attention to their terms. Unless the agency credibly branded its advice as “tentative,” then, advice given at the agency’s head—that is, the 10,000 letters she signed—would qualify as “final agency action” subject to judicial review.

National Automatic Laundry & Cleaning Council remains one of the more thoughtful and balanced opinions written on the tensions animating publication rules questions. It is one of the very few to explore the dimensions of the practice and the practical consequences of that practice, not only for the party who may be complaining in a particular case, but also for the public generally in its dealings with the agency. The D.C. Circuit’s very recent opinion in *Appalachian Power Co. v. EPA*,⁴⁸ though less temperate or understanding in its diction about the practice,⁴⁹ reaches the

45. See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1970); see also Thomas, *supra* note 11, at 142; Titolo, *supra* note 11, at 16.

46. See 443 F.2d 689 (D.C. Cir. 1971). See also *supra* text accompanying note 6.

47. *Nat’l Automatic Landry & Cleaning Council*, 443 F.2d at 699.

48. 208 F.3d 1015 (D.C. Cir. 2000).

49. See *infra*, note 86.

same result on the question of finality and ripeness, under factual circumstances that seem comparable. The EPA's publication rule in that case, produced in the upper echelons of the agency, spoke to state authorities; it could be expected to make them act in ways that would have expensive impacts on private industry, yet could not realistically be challenged at a later stage.

[W]hatever EPA may think of its Guidance generally, the elements . . . petitioners challenge consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply."⁵⁰ Neither temporary nor interlocutory, the publication rule "reflect[s] a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies . . . who must obtain Title V permits in order to keep operating."⁵¹

Balanced against the risks that permitting review inevitably raises—the risks animating Justice Fortas' dissent in *Abbott Laboratories* and, in some cases, those of *Heckler v. Chaney*⁵² as well—are two factors that, if both are strongly present, warrant review nonetheless. The first is demonstrable and important concrete impact on private behavior. If citizens facing firmly held agency views are likely to modify their conduct in ways expensive to them rather than face the consequences of having those views applied to them, as in *Abbott*, review will be available *only* in conjunction with the agency's adoption of its publication rule. Our system's general commitment to the justice of providing avenues of declaratory judicial relief in such circumstances supports a similar conclusion here. The second factor might be described as agency control. Reviewability is, in effect, a price the agency pays for giving prominence and concreteness to its publication rules. When a central agency office publishes notice that it is considering a matter and, after some exchanges with affected parties, then publishes its conclusions under the imprimatur of high officials and with indications that it expects to hold the public to its policy, the argument for review is strong; so also when it chooses 10,000 of 750,000 letters of advice to receive the administrator's signature. When advice emerges from lower staff echelons, when—even if published—the public can be expected to realize that top agency levels have not yet fully considered the matter, or when the publication rule itself is framed in a manner that indicates that issues remain open and administrative avenues remain available to pursue them, then one cannot conclude that agency action is final. Permitting review in such circumstances would threaten both a diversion of agency

50. *Appalachian Power Co.*, 208 F.3d at 1022.

51. *Id.* at 1023.

52. 470 U.S. 821 (1985).

resources, perhaps into forcing final judgment about this question at a time when other issues have more important claims on agency resources, and work to discourage the practice of providing guidance at all. If the agency can in effect be given control over whether review is available or not, by having that question turn on its signals, this question of discouragement should be substantially resolved.⁵³

In *Hudson v. FAA*,⁵⁴ the D.C. Circuit faced a challenge to the FAA's changed policy for applying a regulation setting a safety standard for air frames. The standard required manufacturers to show that, for planes of a certain size, all passengers could be evacuated through emergency exits within ninety seconds. It further provided that "[compliance] with this requirement must be shown by actual demonstration . . . unless the Administrator finds that a combination of analysis and testing will provide [equivalent data]"⁵⁵ Published FAA guidance about this standard had, for about twenty years, required retesting of changed designs through actual demonstration if the change enlarged passenger capacity by more than five percent. In 1998, following a study prompted by reports of injuries occurring during retesting, the agency issued new guidance dropping the five percent threshold and making the adequacy of analytic data a question in each case. The guidance document also announced the FAA's confidence that for two particular airframe expansions, for which approval was then being sought, "a wealth of full-scale evacuation data are available," and thus, "conduct[ing] . . . additional full-scale evacuation demonstrations is not required to demonstrate compliance, if a satisfactory analysis is produced."⁵⁶ In what the panel characterized as "a rather unorthodox manner," but one that in the writer's experience is often employed and commenters have strongly urged,⁵⁷ the FAA sought public comment on this change. Eventually, it found the air frames in question in compliance with its evacuation standard, on the basis only of data and analysis; and various persons who expected to have to travel in these planes then sought review, asserting, inter alia, that the five percent threshold

53. The argument here is quite different from Justice Scalia's argument in dissent in *United States v. Mead Corp.*, 121 S. Ct. 2164, 2188 n.6 (2001), that the dignity of challenged publication rules could be determined by an agency's litigating judgments made after judicial review has been sought. Justice Scalia, ordinarily one of the Court's stronger proponents of ripeness constraints when review of executive action is sought, e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), presumably did not have these considerations in mind when constructing his argument. See *infra* note 61.

54. 192 F.3d 1031 (D.C. Cir. 1999).

55. *Id.* at 1033.

56. *Id.*

57. Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 578-84 (1977).

could be dropped only by a notice-and-comment regulation.

By characterizing the guidance document as a "general policy statement" rather than an interpretive rule, the panel avoided circuit precedent requiring the use of notice-and-comment rulemaking to change an established interpretation;⁵⁸ and on the substance of the matter, it found the guidance adequately supported. Before reaching these questions, however, it had to consider whether review had been timely sought, since petitioners had awaited and challenged concrete application of the guidance rather than seeking review within sixty days of its issuance (as they would apparently have been obliged to do if asserting the procedural insufficiency of a regulation). Thus, it appears that the government was arguing that *this* guidance document had constituted final agency action ripe for immediate review. While one understands that lawyers are prone to argue whatever makes it more likely their client will prevail, the government seems more likely, usually, to argue *against* the finality and/or ripeness of publication rules. The panel easily found that, given the announcement in the guidance document of the pending approval proceedings in which the new approach might be applied, "we would likely have regarded petitioner's APA challenge as premature if it had been brought before the issuance of the certificate, and so we do not agree that petitioners' subsequent challenge is too late."⁵⁹ Implicit in the whole discussion, however, is that for publication rules unmistakably representing an agency's considered view and directly affecting citizen interests, the proper issue will much more often be ripeness than finality.

III. CHEVRON OBEDIENCE AND SKIDMORE WEIGHT

The Supreme Court's recent decision in *Christensen v. Harris County*⁶⁰ and its very recent decision in *United States v. Mead Corp.*⁶¹ have focused attention on how one might articulate the way in which agency judgments on matters of law or policy should influence reviewing courts. Putting aside the possibility of treating agency views as simply irrelevant, two models live in the cases. The first might be described as "obedience"—courts encountering agency decisions they conclude the agencies were

58. See *supra* note 12.

59. *Hudson*, 192 F.3d at 1035.

60. 529 U.S. 576 (2000).

61. 121 S. Ct. 2164 (2001). This paper had entered the final stages of editing when the *Mead Corp.* decision was announced. The author hopes for the reader's indulgence concerning the perils of instant analysis. He believes the opinion generally consistent with the analysis developed here—in particular, the importance of the model of precedent—although it leaves more scope for requiring Chevron obedience to agency judgements not made pursuant to public procedures than he would find comfortable.

authorized to take must accept the conclusions they embody rather than displace them with their own independent judgment on the matter. The second, as “weight”—the court is responsible for decision of a matter; but, in so deciding it will treat the agency views as constituent elements of its own decision, as persuasive if not controlling material whose force derives from the agency’s office and the dignity of its action. The “obedience” model is firmly associated in the Court’s canon with its decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*⁶² that, within the possibilities of meaning a statute’s language could be given, a matter for the courts to decide, a reviewing court must accept any reasonable interpretation given that language by the agency Congress has empowered to implement the statute. The “weight” model was best articulated by Justice Jackson in *Skidmore v. Swift & Co.*,⁶³ this was private litigation to enforce the Fair Labor Standards Act, in which the authority of interpretive advice given by the Administrator of the relevant division in the U.S. Department of Labor had been invoked:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁶⁴

Christensen, which arose in precisely the same context as *Skidmore*, held that *Skidmore* weight rather than *Chevron* obedience remained the correct measure of the force of an agency upon judicial interpretation of text, where the agency interpretation was expressed in a publication rule.⁶⁵ *Mead Corp.*, which concerned a Customs Service tariff classification ruling, reiterated the point, with rather more (and more satisfactory) attention to the nature of that weight and its influence on judicial judgment.⁶⁶

The tendency of government lawyers to argue for more than perhaps they advisedly should may be nowhere more evident than in their arguments, especially post-*Chevron*, that publication rules have the same authority for reviewing courts as do statutes or regulations interpreting statutes—that once a court has found a publication rule authorized, it is bound to accept it. Section 552(a)(2), however, suggests a different way of

62. 467 U.S. 837 (1984).

63. 323 U.S. 134, 139-40 (1944).

64. *Id.* at 140.

65. See *Christensen*, 529 U.S. at 587-88.

66. See 121 S. Ct. at 2168, 2175-76.

understanding the force of publication rules. It treats agencies as permitted to give publication rules *in any form* the force of precedent, rather than statute.⁶⁷ It does so in two ways. First, it lists them together with agency precedent, as if each of them had equal dignity. Second, it describes the permitted effect the agency may give its published precedents or interpretive rules, policy statements, manuals, and the like in a way that sounds like the treatment of precedent: "A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if"⁶⁸ it has been published as the statute provides, or the party had actual and timely notice of it. The question for exploration here, in my judgment, is whether it is possible to distinguish this permitted precedential effect—permission to the agency to rely on its published position to the disadvantage of a party—from what we mean when we say that an agency judgment "binds" a private party, or a court.

The analysis here is in fundamental agreement with a principal element in the scholarship of Professor Robert Anthony, if not with his particular analysis.⁶⁹ He started his scholarship on this subject thirteen years ago with *Chevron*, whose fundamental proposition is that, on some issues and within the zone of reasonableness, courts are significantly bound by—obliged to

67. As William Funk and Todd Rakoff have pointed out to me, permission to rely on publication rules is given by 5 U.S.C. § 552(a)(1), for those that are published in the Federal Register, as well as by section 552(a)(2), for those that are otherwise published and indexed. The 552(a)(1) formulation does not, in terms, use the idea of precedent. Nonetheless, "precedent" remains an evocative way to describe the middle ground between legislative force, which regulations enjoy, and a total absence of jural force. The text of section 552(a)(1), it may be observed, refutes the D.C. Circuit's suggestion, in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), that the simple fact that "the agency has published the rule in the Code of Federal Regulations" can be taken to demonstrate that a rule is a legislative, not an interpretive rule.

68. 5 U.S.C. § 552(a)(2) (1994 & Supp. V 2000).

69. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) [hereinafter Anthony, *Interpretive Rules*]; Anthony, *Lifting the Smog*, *supra* note 37; Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1 (1996); Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. (forthcoming Dec. 2001); Robert A. Anthony, "Well, You Want the Permit, Don't You?" *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31 (1992); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990); Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference? — A Preliminary Inquiry*, 40 ADMIN. L. REV. 121 (1988) [hereinafter Anthony, *Agency Interpretations*]; Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667 (1996).

accept without the possibility of revising—agency judgments about legal issues that statutory language leaves open.⁷⁰ Professor Ronald Levin's recent work has persuasively shown that one necessary condition of such judgments is that they be able to survive *Overton Park/State Farm* review.⁷¹ Another necessary condition, and this is Professor Anthony's assertion, is that they be the product of a delegated lawmaking process—whether formal adjudication or notice-and-comment rulemaking. If they constitute, simply, interpretive rules or statements of general policy, or a course of precedent developed through informal means, then—here we are at *Christensen*—a reviewing court may find it appropriate to give them some weight but should not say that it was “bound” by the agency's view. Whatever judgment is exercised, that is, is the reviewing court's judgment—informed to whatever extent the circumstances warrant by the agency's developed view.⁷²

Putting it this way should suggest that what is being invoked is the common-law model of balancing. “Weight,” like “balancing,” metaphorically suggests the scales of justice, but few pretend to any very precise account of what goes on those scales. One has “more” or “less,” rather than “5” or “8.2.” Discussions of common-law technique for dealing with analogy, or evaluating the law of different (but perhaps influential) jurisdictions produce evocative formulations. Justice Frankfurter argued in a variety of contexts that the absence of “a calculus of value,”⁷³ “talismanic words,”⁷⁴ or “a table of logarithms”⁷⁵ did not preclude but rather characterized judicial judgment. “It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.”⁷⁶ Justice Jackson's *Skidmore* formulation self-evidently draws on the same

70. See Anthony, *Agency Interpretations*, *supra* note 69, at 121-22.

71. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1286 (1997).

72. *Mead Corp.* substantially adopts this analysis but—presumably out of the wish to avoid overruling precedents that had not discussed the point—reserves the possibility of “reasons for *Chevron* deference even when no [procedural] administrative formality was required and none was afforded.” 121 S. Ct. 2164, 2173 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57, 263 (1995)); compare 121 S. Ct. at 2184 n.4, with *id.* at 2186 (Scalia, J., dissenting).

73. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

74. *Id.* at 489.

75. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

76. *Universal Camera Corp.*, 340 U.S. at 489.

traditions.⁷⁷

Staying for the moment with the court model, we can observe that what we mean when we say a judicial judgment or rule is “binding” varies considerably with the subject of our inquiry.⁷⁸ When we say precedents are binding on lower tribunals, we mean that the lower tribunals are powerless to revise them and subject to summary reversal for ignoring them; in a hierarchical system of courts, under a rule of stare decisis, lower tribunals are without discretion to depart from the norms previously announced by superior authority.⁷⁹ An analogy to *Skidmore* weight is what courts afford precedents of a coordinate, inferior, or foreign jurisdiction—if and to the extent they are persuasive, and bearing in mind the affirmative values of uniformity and how the legislature has assigned responsibility, they will be weighed.⁸⁰ Courts in the First Department of New York’s Appellate Division will pay attention to judgments in the Second Department or the Second Circuit, assessing their persuasiveness and coherence with other doctrine, but they will not say that they are “bound” by them. When a court is regarding the force of its own prior decisions, there is an intermediate ground: the court will depart from them only to the extent the present controversy was in fact not there decided (the cases can be distinguished) or it can be persuaded that its earlier judgment was seriously in error (the prior holding is overruled). While overruling is always possible, courts will say that it commands a showing considerably stronger

77. The tone of the majority and dissent in *Mead Corp.* can readily be understood in relation to authorial comfort with these traditions. Justice Souter, author of the majority, responds to the uncertainties by remarking that “[j]udges in other, perhaps harder, cases will make reasoned choices between the two examples [*Chevron* and *Mead Corp.* as exemplars of obedience and weight], the way courts have always done,” 121 S. Ct. at 2176 n.18, and characterizes the difference between the Court and Justice Scalia in these terms: “Justice Scalia’s first priority over the years has been to limit and simplify. The Court’s choice has been to tailor deference to variety.” 121 S. Ct. 2176. Justice Scalia, consistently troubled by balancing tests, *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (dissent), and resistant to the common-law functions in federal courts, *Alexander v. Sandoval*, 121 S. Ct. 1511, 1519–20 (2001), foresees an explosion of litigation if the “discarded” *Skidmore* test is revived—failing to recognize that it lived happily side by side with *Chevron*’s predecessor, *NLRB v. Hearst Publications*, 322 U.S. 111 (1994), for the four decades preceding *Chevron*.

78. See generally, Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431 (1989).

79. For a particularly strong statement in the context of statutory interpretation, see *Neal v. United States*, 516 U.S. 284 (1996).

80. I owe to John Manning the suggestion to compare *Salve Regina College v. Russell*, 499 U.S. 225, 232–33 (1991) (discussing the basis, in an *Erie* context, for courts of appeals to respect the knowledgeable views of district judges about the law of the states from which they are appointed).

than may have elicited the initial conclusion.⁸¹

Whether administrative agencies will think themselves “bound,” or will be thought by subsequent reviewing courts to have been “bound” by judicial decisions is a more complex question we know as the “nonacquiescence” question. When the agency has to know that the particular matter before it will come to the same appellate tribunal as has previously spoken, most thoughtful observers—and certainly that tribunal—can be expected to say that it is “bound.” Yet even this case is somewhat controversial.⁸² When the reviewing court might be one that has *not* yet spoken, the prevailing rule is that the agency is *not* bound, although it would be well advised to explain its reasons for refusing to accept the previous judicial instruction it received.

Now, still in the court context, how would we talk about the impact of precedent on the parties to litigation? Within the case—*res judicata*, the law of the case—the parties to that litigation are bound in the strong sense: judgments must be paid and contempt citations are possible. In some circumstances, we would expect courts to declare a party collaterally estopped from asserting in one litigation a proposition it had lost in another. On the whole, this is a proposition about disputed facts, not law. For agencies, moreover, it is essentially subsumed into the nonacquiescence issue; collateral estoppel, as estoppel generally, is not a powerful idea.

In the *stare decisis* context, courts have occasionally voiced the idea that a precedent once established is binding even on those who were not parties to its generation; but what they seem to have meant is that the parties ought to have a high degree of confidence that the courts themselves will follow precedent, under the discipline of *stare decisis*, not that negative consequences (like contempt of court citations) could flow from the very fact of an attempt to contest it. In a theoretical sense, it is always possible to argue for the distinguishing or overruling of precedent in the court that set it. One can find in the literature elegant discussions of how long such efforts can properly endure before private litigants should understand that the effort is fruitless and that respect for the system of law requires that they simply comply. Even these discussions, however, suggest no independent penalty that would attach to a failure to accept the precedent—

81. For courts like the federal courts of appeal, which sit in panels, the question of overruling established circuit law is generally reserved to the court sitting *en banc* under its rules of practice.

82. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Mathew Diller & Nacy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990).

as one would, say, to the violation of a criminal statute—just a strong signal to parties and the lower courts that resistance is unlikely to be fruitful. They should be completely confident, that is, that the prior precedents will be the law applied to their cases even though, in theory, the opportunity of attempting a distinction or seeking an overruling is open to them. One might note, moreover, that this argument is weaker if one is speaking of agency rather than judicial precedent; considerations of protecting justified reliance interests aside, we generally expect and indeed approve fluidity of policy development in the agency context. Thus, one could expect agencies to assert considerably greater freedom of revision than courts think proper in their own practice.

What seems important to note here is that these ideas of legal obligation are a great deal more nuanced than we generally encounter in the statutory context. Statutes, if valid, are indisputable; and serious consequences attach directly to their violation. One can argue whether they are applicable or not; but the adjudicatory forum is not a place where you can argue for their revision. That can only happen if the legislature again acts in the constitutionally prescribed manner. Regulations adopted following statutorily commanded procedures are treated in just the same way. While courts entertain disputes about the validity of such regulations much more readily than they do for statutes, and with much more intrusive inquiry, a valid regulation is equally indisputable. It binds court, agency, and private actors alike, and revision can happen only through further rulemaking. Serious consequences may attach directly to its violation.

From a certain perspective this is a stunning result, since it means the courts will accord to valid executive action the same ultimate authority over their judgment as they do to valid legislative action. We are accustomed to thinking of judicial review as having much more purchase over executive action than legislative. But on further reflection, it ought not be so surprising. Where the greater control of executive action is exercised is in determining its validity. Here we return to the ways in which Professors Levin and Anthony understand *Chevron*. If the rulemaker has been authorized to act and has acted within the parameters of its authority—the courts determine these questions, and even under *Chevron* they do so with a lot more attention than they pay to the corresponding questions for statutes—then we have the valid action of a coordinate branch. Why should it, any more than the authorized act of the legislature, be open to judicial revision? The judges are bound. So, we might note, are all agency officials and citizens. Even before the agency, citizens might seek a waiver or they might seek an interpretation; but what they cannot seek, unless in a fresh rulemaking proceeding, is a revision. They, as the agency, and as the court, are bound.

For interpretive rules, statements of general policy and the like, on the other hand, that APA section 552 adopts the model of precedent. The agency may rely on these publications, which is not quite the same as saying it is entitled to treat them as binding on the public. For reviewing courts, *Christensen* and *Mead Corp.* tell us, echoing *Skidmore*, the conclusion is the same. The court exercises its own judgment, informed in doing so by the conclusions the agency has reached. What about lower tiers of authority within the agency—are *they* bound by the agency's instructions? The model of precedent here suggests a different kind of response; if the source of the published advice or instruction is hierarchically superior, one could suppose an agency inspector to be in just the same position as a trial judge reading an appellate opinion. She is professionally obliged to obey. Such expectations are reflected, for example, in the instructions the Customs Service was noted to have given its own staff concerning rulings like those at issue in *Mead Corp.*; a ruling letter, the Court observed, "represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel . . . until modified or revoked."⁸³ If we approach these difficult questions from the model of "precedent" rather than "statute," then, in my judgment we may be able to make some helpful progress in understanding.

When Hektor was cited for violation, because he kept his tigers behind only a six-foot fence, the formal state of affairs was that the agency had to demonstrate that he had not provided the "structurally sound" containment its regulations validly required. On a precedential model, we might say that the fact that the agency had told its inspectors to accept eight-foot fences as complying with this standard could be taken to establish, *prima facie*, that his six-foot fence was a violation—but that would be a *prima facie* showing only, and the issue would remain whether Hektor was in violation of the "structurally sound" containment requirement. The case is no different than if, in some prior adjudication to which Hektor was not a party and in which another game park owner appeared without effective counsel, the agency had found that six feet was inadequate, and eight feet was required. Hektor gets to show that, in his case, six feet was enough; or, to challenge the prior outcome. Of course this may be costly and difficult to do; for most game park owners, as for most builders of nuclear power plants, the most cost-effective route may be to go along with what the staff has identified as *a priori* acceptable. In this way, the practical effect of the staff position may be quite substantial. Still it is the standard of structural soundness that must be satisfied; "eight feet" is no better than a provisional

83. 121 S. Ct. at 2168 (emphasis added) (quoting 19 C.F.R. §177.9(a) (2000)).

definition of what will meet it, and Hochtory should be free to follow his preferences if he has the confidence of his design.

Note, on this account, that *someone* may be bound—not Hochtory, but the agency inspectorate, those who are down the chain of command from the office issuing this interpretation-policy-guidance. Hochtory is being somewhat disadvantaged, to be sure; assuming section 552(a) has been complied with, the agency may rely on its definition in meeting its burden about structurally sound containment. But if Hochtory, in fact, has an eight-foot fence, well built and appropriately distant from overhangs, we might expect not just that the agency's staff *will* not, but that it *cannot*,⁸⁴ seek to fine him for violating the regulation requiring a structure that is sound for containment purposes until the agency changes its advice—a change it will need to justify. Hochtory could complain if an inspector ignored the advice she found in the agency's manuals, and that inspector might well find herself the subject of employment discipline. Understanding these effects of interpretive rules and manuals helps us to see why publicity for these documents is so avidly sought, and why it is that private actors are also assiduous to show that an agency in fact has some such internal "law," which has been departed from in their case.⁸⁵ As Judge Posner recognized,

Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement, which the Administrative Procedure Act assimilates to an interpretive rule. It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.⁸⁶

84. The case is perhaps different for inspectors' manuals, as for a district attorney's manuals for police and prosecutors. See *Hutcherson v. United States*, 345 F.2d 964 (D.C. Cir. 1965) (Burger, J., concurring and Bazelon, J., dissenting).

85. For an example of a court unselfconsciously treating a publication rule as binding upon the government, see *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000). Facing a conflict in holding between two circuits on an issue of tax law, the government had published "a document styled Action on Decision" announcing its acquiescence in the taxpayer-favoring outcome. This publication rule led an en banc panel of the Eighth Circuit to vacate the government-favoring outcome one of its panels had reached as moot—an outcome defensible only on the understanding that the government had in some respect bound itself by issuing the document.

86. *Hochtory v. U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996). Compare with this formulation Judge Randolph's disapproving characterization in the *Appalachian Power* case:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. . . . Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and

This seems particularly apt for interpretations that are primarily directed to the agency's own staff—inspection manuals, for example—with the motivation of securing a desirable internal consistency of action. The interpretation in *Hector*'s case was embodied in such a manual, a manual that spoke to the inspector, not to *Hector*.

On this understanding, it would be an error for the Department to charge *Hector* with violating its eight-foot rule. The agency has not adopted such a rule, and that charge would mistake the legal issue to be decided at the sanctions hearing. Of course, it may be appropriate to bear in mind the inadequacy, the complexity, of talking about an "agency," as if it were a seamless, anthropomorphic entity. If the inspector's complaint, that begins an enforcement proceeding, cites *Hector* for "[f]ence for tigers six feet high, not eight," that may be a mistake only of syntax, one encouraged by the manual that appropriately directs her own conduct. So long as *Hector* is permitted to show, before the fine is assessed, that the containment he provided was in fact structurally sound and adequate to contain his tigers (a showing that might prove difficult if the precipitating cause of the citation was the presence of one of his tigers in farmer Johnson's cattle yard), such a mistake would seem not to have been prejudicial.

Judges are not always careful to observe the difference between "binding" in precedential and legislative terms, as may be suggested by a contrasting pair of excerpts—the first from Judge Posner's *Hector* opinion, and the second from Judge Randolph's opinion in *Appalachian Power*:

Hector: Had the Department . . . said in the internal memorandum that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than eight feet would provide secure containment, and would therefore presume, subject to rebuttal, that a lower fence was insecure, it would have been on stronger ground. For it would have been tying the rule to the animating standard, that of secure containment, rather than making it stand free of the standard, self-contained, unbending, arbitrary.⁸⁷

Appalachian Power: If an agency acts as if a document issued at headquarters is controlling in the field, *if it treats the document in the same manner as it treats a legislative rule*, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the

comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 1971).

87. *Hector*, 82 F.3d at 171.

document, then the agency's document is for all practical purposes "binding."⁸⁸

The Department could properly hope that "a document issued at headquarters [would be regarded by its staff as] controlling in the field"⁸⁹—that is why it is issued. Similarly, it will hope that—and the public will be best served if—its staff "bases enforcement actions on the policies or interpretations formulated in the document."⁹⁰ And an agency that is reliable in its advice will inevitably "lead[] private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document."⁹¹ None of these treatments of a publication rule entail the conclusion that it has "treat[ed] the document in the same manner as . . . a legislative rule."⁹² That requires a further step.

In *Hector*, the Department had taken that step. It compounded its internal error by arguing to the courts as if they, too, were constrained by the agency's approach.

The only ground on which the Department defends sanctioning *Hector* for not having a high enough fence is that requiring an eight-foot-high perimeter fence for dangerous animals is an interpretation of the Department's own structural-strength regulation, and "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"⁹³

The Department, thus, appeared to be arguing that its interpretation, qua interpretation, bound both *Hector* and, in a sense arguably even stronger than *Chevron*,⁹⁴ the court.

The *Stinson* case, on which the Department relied, is yet another outcropping of the proposition that an agency's interpretation of its own rules has "controlling weight unless it is plainly erroneous or inconsistent with the regulation"⁹⁵—that "a reviewing court must accept a 'plausible construction of the . . . regulation' even if it is not 'the best or most natural

88. *Appalachian Power*, 208 F.3d at 1021 (emphasis added) (citing Anthony, *Interpretive Rules*, *supra* note 69, at 1328-29).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 169 (4th Cir. 1996) (quoting *Stinson v. United States*, 508 U.S. 36, 42-46 (1993)).

94. *Stinson* review does not appear to include the consideration of agency reasonableness—the *Overton Park* and *State Farm* issues—that is an element of *Chevron*'s notorious second step.

95. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

one by grammatical or other standards.”⁹⁶ In his remarkable first work, *Constitutional Structure and Judicial Deference to Agency Rules*,⁹⁷ my colleague, John Manning, forcefully suggested a constitutional basis, grounded in separation of powers considerations, for concluding that the proper deference model for agency self-interpretations that are not in themselves the exercise of delegated lawmaking authority ought rather to be the *Skidmore* model.⁹⁸ An increasingly rich literature, unnecessary to imitate here, has pointed in similar directions in recent years;⁹⁹ and perhaps, as Professor Richard Pierce has suggested, *Christensen* will be found to open the door to such a reconsideration.¹⁰⁰ Although the last few lines of *Christensen* indicate that agency interpretations of their own rules may still be regarded as controlling if textually available, Manning’s arguments were not considered there; and it is becoming increasingly evident how much mischief the D.C. Circuit is being led into, in understandably squirming to avoid this particular hook.¹⁰¹

As Professor Anthony has long argued, and the Supreme Court in *Mead Corp.* has now indicated will ordinarily be the case, an agency ought not be able to claim for its interpretation the capacity to overcome judicial judgment about its authority unless it has used the procedures for lawmaking to adopt it. As made here, this argument is based simply on the diction of section 552 and the understanding it suggests, responsive to the levels of formality involved, of the difference in effect between publication rules and regulations. Publication rules may be binding within an agency hierarchy, as precedents are binding on the lower tribunals of a judicial system; but “influence” seems the better account to give of their permitted force over others. *Skidmore* weight, not *Stinson* or *Chevron* obedience, is the right model for judges to deploy.¹⁰²

96. Manning, *supra* note 33, at 613 (quoting *Ehlert v. United States*, 402 U.S. 99, 105 (1971) and *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991)) (referring to *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

97. Manning, *supra* note 33.

98. *Id.* at 689-90.

99. See Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921 (1998); see also Rakoff, *supra* note 14; Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with The Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000).

100. Cf. Pierce, *supra* note 12, at 574. The bulk of the *Christensen* discussion, however, concerned the agency's interpretation of a statute, not an agency rule.

101. See *id.* See also Kieran Ringgenberg, Comment, *United States v. Chrysler: The Conflict Between Fair Warning and Adjudicative Retroactivity in D.C. Circuit Administrative Law*, 74 N.Y.U. L. REV. 914 (1999).

102. See Manning, *supra* note 33, at 690.

The *Mead Corp.* Court's recent account of *Skidmore* weight, it might be added, is not empty, albeit it leaves the judge with more responsibility for decision than the alternatives. The Court pointedly invoked Justice Jackson's formulation in that case, that the judge's obligation is to accord the agency's view the weight properly owing "a body of experience and informed judgment to which courts and litigants may properly resort for guidance," taking into account "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control."¹⁰³ Respect for the agency's view, given its responsibilities and knowledge, is commanded by good administration; rejection of the considered view of an agency "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" should be "justified by very good reasons."¹⁰⁴

This explication is a notable improvement on Justice Thomas's opinion in *Christensen*, which readers might fairly think gave little more than lip service to *Skidmore*. Like both *Skidmore* and *National Automatic Laundry and Cleaning Council*, *Christensen* had presented a question of meaning under the Fair Labor Standards Act, on which the Administrator had expressed a view in a manner reflecting relatively careful consideration.¹⁰⁵ Yet Justice Thomas's opinion never considered the Administrator's view as if it had "weight" owing to its being the view of an official to whom Congress had given responsibility and who had a superior ability to assess the importance of the issue raised to the overall program. Rather, he presented the statutory question as argued by the advocates before the Court, characterized the government's *arguments* as "unpersuasive," and showed how he believed the statutory question should be resolved. Only then did he turn to the question of the Department's opinion letter, and after explaining why *Skidmore* weight rather than *Chevron* obedience is the proper model, his full discussion was this: "As explained above, we find unpersuasive the agency's interpretation of the statute at issue in this case."¹⁰⁶ Justice Jackson's factors and considerations nowhere appear. In *Mead Corp.* they were examined in some length, and the case was remanded to the Federal Circuit with instructions to reconsider the appeal

103. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

104. *Id.* at 139-40.

105. The letter in *Christensen* was signed by the Acting Administrator of the Division and published. *Christensen v. Harris County*, 529 U.S. 576, 581 (2000). See *supra* text accompanying note 47.

106. *Christensen*, 529 U.S. at 587.

in their light.¹⁰⁷

The familiar judicial contrast between giving an agency's reasoning and judgment weight and according it controlling force is implicit in *Chevron* itself. Step one of the *Chevron* analysis requires the court to delineate *for itself*, to the extent it can, the judgments Congress has made, using "traditional tools of statutory construction."¹⁰⁸ Then, having decided for itself what the statute *could* mean, with the responsibility to reject "administrative constructions which are contrary to clear congressional intent"¹⁰⁹—that is, outside this judicially delineated range of possible meaning—the court is obliged to accept reasonable agency constructions that are within the range of possibilities it has independently found. This second step, the one that has attracted so much attention in the literature, is the step at which *Chevron* obedience is called for. But the Court has long described the "traditional tools of statutory construction"¹¹⁰ to be independently deployed by the courts at step one to include consideration of agency interpretations. "The interpretation of the meaning of statutes," the Court sixty years ago confirmed in *United States v. American Trucking Ass'ns*,¹¹¹ is "exclusively a judicial function."¹¹² Yet, the Court later observed in the same opinion,

In any case [in which questions of statutory construction arise that have also been confronted by an agency responsible for administration of the statute in question, its] interpretations are entitled to great weight. This is particularly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the [agency's] interpretation gains much persuasiveness from the fact that it was the [agency] which suggested the provisions' enactment to Congress.¹¹³

107. See 121 S. Ct. 2164, 2177 (2001).

108. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

109. *Id.* This way of putting the *Chevron* proposition was recently confirmed in *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001), where the Court thus summarized its statutory reading: "We conclude, however, that the agency's interpretation goes beyond the limits of what is ambiguous, and contradicts what in our view is quite clear." *Id.* at 916. That is, the step one question is whether the agency has attached to the statute a meaning it cannot bear, not (as it is too often put) whether the statute precisely resolves the question.

110. *Chevron*, 467 U.S. at 843 n.9.

111. 310 U.S. 534 (1940).

112. *Id.* at 544.

113. *Id.* at 549 (quoting *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933)). See *SEC v. Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935) (per L. Hand, J.) (purporting that testimony at hearing by government official does not control interpretation, but supports it); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (explaining NLRB is not an appellate tribunal in relation to hearing officer's conclusions, but nonetheless those

“Weight” means that these are factors to be worked into the analysis alongside other traditional tools, such as independent reading of the text. The unmistakably judicial task of limning the statute’s possible meaning is incorrectly performed if they are not considered—just as it would be incorrectly performed if the text, or coordinate statutes, or other “traditional tools” were not considered. It is precisely here that, in practice, the majority opinion in *Christensen* failed to deliver on its *Skidmore* promise. It treated the agency’s view of its authority as if it were merely the argument of an advocate’s brief, and not vital evidence of meaning that should inform its own decision.

Justice Scalia, concurring in *Christensen* and dissenting in *Mead Corp.*, has been a lonely critic of the revival of attention to *Skidmore*. *Chevron* did not discuss *Skidmore*, or present itself as working a dramatic change in the nature of judicial review of administrative action—although the literature has certainly given it the latter characteristics, one can understand it as no more than a generalization of the Court’s long-standing *Hearst* doctrine.¹¹⁴ Nonetheless, as he argued, *Chevron*’s rationale was not limited to the context of regulations, and subsequent holdings had applied *Chevron* to a variety of “authoritative agency positions” that were not the product either of notice-and-comment rulemaking or of formal agency adjudication. *Chevron*, therefore, had displaced *Skidmore*. Although at times, Justice Scalia has seemed to enjoy playing the bull in the administrative law china shop,¹¹⁵ here he accused his colleagues of working “an avulsive change in

conclusions have weight in the record on the basis of which its judgment is to be reviewed).

114. See *supra* note 77. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1120-21 (1987).

115. Thus, in *Allentown Mack Serv. and Sales, Inc. v. NLRB*, 522 U.S. 359, 376-79 (1998), he blithely overlooked half a century’s understanding that the Court would not itself perform substantial evidence review. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). In *Assoc. of Data Processing Serv. Orgs. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 685-86 (D.C. Cir. 1984), an opinion he wrote while sitting on the D.C. Circuit, again ignoring the Supreme Court’s expressed understanding, he denied any possibility that judicial review of agency fact-finding under the APA’s “substantial evidence” and “arbitrary and capricious” standards invoked differing standards.

Assoc. of Data Processing Serv. Orgs. holds that the “substantial evidence” review standard of 5 U.S.C. § 706(2)(E) for on-the-record proceedings, and the “arbitrary and capricious” review standard of 5 U.S.C. § 706(2)(A) are equivalent. *Id.* at 683-84. While it is certainly true that neither formula “furnish[es] a calculus of value by which a reviewing court can assess the evidence,” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), one could observe the same about many formulas evoking the process of judicial judgment. Courts have long known how to differentiate “preponderance of the evidence” from “beyond a reasonable doubt.” So, one might have thought, here. “[A] standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in.” *Id.* at 489.

judicial review of federal administrative action.”¹¹⁶

It is remarkable to find a Justice who in the past has been attentive to arguments about the precise basis of agency power¹¹⁷ so accepting of the proposition that agency actions *not* constituting an exercise of delegated procedural authority could so restrict judicial decision.¹¹⁸ As he clearly regards such actions as the exercise of executive authority,¹¹⁹ his view may be grounded in the expansive visions of presidential authority (and hesitations about judicial authority) he has voiced in other contexts.¹²⁰ Yet it is striking that decisional responsibility in *Christensen* inevitably lay in the courts; as had been the case in *Skidmore*, this was litigation between “private” parties (one of them a county) about their rights and duties under federal law; the federal administrator, who had not purported to act in any other than an advisory capacity, had no formal role in this dispute and was not a party to it.

The driving practical concern underlying Justice Scalia’s resistance to *Skidmore* appears to lie in what he understands to be the static quality of statutes as the judiciary encounter them. Under *Skidmore*, the court—not the agency—is saying what the statute means (even if with the agency’s assistance). If a court is to assign meaning to a statute, that meaning then becomes fixed. Consequently, “the majority’s approach will lead to the ossification of large portions of our statutory law.”¹²¹ *Chevron* leaves revision of meaning “within the control of the Executive Branch for the future. Once the Court has spoken [in a *Skidmore* analysis] it becomes *unlawful* for the agency to take a contradictory position; the statute now says what the court has prescribed.”¹²² Separation of powers principles preclude judicial acceptance that their judgments are open to revisions by the executive;¹²³ the Court has been emphatic that its statutory readings

116. *United States v. Mead Corp.*, 121 S. Ct. 2164, 2177 (2001).

117. *E.g.*, *Mistretta v. United States*, 488 U.S. 361, 413-27 (1988) (Scalia, J., dissenting) (stressing the importance of judicial attention to authority given the failures of the delegation doctrine).

118. Compare the works of Robert Anthony, *supra* note 69 and accompanying text.

119. Justice Scalia wrote for the majority in *Whitman v. Am. Trucking Ass’ns*, 121 S. Ct. 903, 911-14 (2001), characterizing as executive, not legislative, power the EPA’s challenged authority to adopt regulations in that case. Compare the separate opinions of Justice Thomas and Justice Stevens with Justice Souter on precisely this point. *Id.* at 919-21. *A fortiori*, giving guidance must be an executive activity.

120. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 604 (1992).

121. *United States v. Mead Corp.*, 121 S. Ct. at 2181.

122. *Id.* at 2182.

123. *See id.* (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

may be revised only by Congress.¹²⁴ “What the courts says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking.”¹²⁵

While this appears to be a powerful argument, its validity is limited to judgments of the Supreme Court; the judgment of a court of appeals, and certainly the judgment of a district court on some technical matter, does *not* render it “unlawful for the agency to take a contradictory position.”¹²⁶ Moreover, the proposition that texts once adopted (and interpreted) acquire a meaning that cannot change with time is *not* engraved in the Constitution, as Justice Scalia himself commendably recognized just days before the decision in *Mead Corp.*¹²⁷ Finally, the analysis offered here goes only to the issue of authority—whether a publication rule is ultra vires the agency’s statutory and regulation framework, and not whether it constitutes sound policy. The impulse underlying the formulations in *Seminole Rock*, *Stinson*, and the like is the defense of agencies from judicial intrusions into the *policy* arena—an impulse that pervades the judicial *oeuvre* on judicial review, as in *Chevron* itself. Whether an agency has authority to act is not, in itself, a question of policy; careful attention to the question of authority, then, does not preclude accepting an agency’s initiative within the arena in which its authority is secure.¹²⁸ Authority having been found, the judicial respect for agency responsibility taught by *Seminole Rock* and *Stinson* can take full hold.

IV. THE PROBLEM OF AUTHORITY FOR PUBLICATION RULES

That an administrative agency must have authority to act in a manner adversely affecting private interests is a central proposition of American administrative law.¹²⁹ Giving *Skidmore* weight to an agency’s determination that its constitutive statutes and regulations authorize a publication rule is an element of analyzing the authority question; nonetheless, the inquiry—like *Chevron*’s first step—is an independent one. A number of considerations suggest, as well, that it be seriously undertaken, in particular that courts need not hesitate so much as they

124. See *id.* (citing *Neal v. United States*, 516 U.S. 284, 295 (1996)).

125. *Id.* at 2183.

126. *Id.* at 2182.

127. See *Kyllo v. United States*, 121 S. Ct. 2038, 2046 (2001).

128. Thus, in *Hudson v. FAA*, 192 F.3d 1031, 1036-37 (D.C. Cir. 1999), once the Court had concluded that the FAA’s publication rule was authorized, it characterized its standard of review for the reasonableness of that rule as less demanding than would have attended a regulation, given its informality. See *supra* text following note 44; see also *Whitman v. Am. Trucking Ass’n*, 121 S. Ct. 903, 911-14 (2001).

129. See Rakoff, *supra* note 14, at 161.

would with statutory text to find a regulation insufficiently precise to authorize challenged agency action.¹³⁰

Questions about the adequacy of statutory precision, whether described in terms of vagueness or of delegation, are freighted with separation of powers considerations restricting their use. For a court to review the sufficiency of the legislative effort is both legally and politically a hazardous enterprise. When confronting Congress's choices about the extent to which it should legislate, and the extent to which it will leave matters to others, the courts are, by confession, lacking in judicially manageable standards.¹³¹ The prohibition against excessive delegation of legislative authority, although mentioned frequently enough, is rarely enforced.

Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."¹³² For coordinate institutions sharing constitutional authority, the Congress and the Court, this conclusion drives the resulting emptiness of the doctrine; the courts could hardly undertake continuously to instruct Congress how better to perform its business without "expressing lack of the respect due coordinate branches of government."¹³³

For statutes, "vagueness" is a constitutional construct as well; a conclusion that a statute is impermissibly vague equally criticizes the legislative effort, asserting that better work could have been done. Accordingly, the citizen's claim to better definition than Congress has given must be deeply grounded, and does not prevent Congress from assigning significant responsibilities to administrative agencies.

Assuring sufficient precision in regulations is a less threatening task, and given the existence of statutory as well as constitutional instructions, a court has more tools at its disposal with which to perform that task. Agencies are not constitutionally coordinate institutions with the courts, nor do their actions come with the political legitimacy statutes enjoy.¹³⁴ The agency's statute and the general framework of its administration provide a context within which the reasonable possibility of drafting regulations of greater specificity can be more confidently assessed; and

130. Cf. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

131. See *Whitman*, 121 S. Ct. at 913.

132. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). The majority opinion is to the same effect. *Id.* at 372-73.

133. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

134. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983).

there is no constitutionally grounded inhibition to making that assessment. Congress, moreover, can *only* legislate; unlike an administrative agency, it possesses no less formal means by which to generate norms significantly influencing private conduct. For this reason, it has a motivation for optimizing the precision of its statutes that agencies lack for their regulations.¹³⁵ Policing the adequacy of regulations to support subsequent publication rulemaking, then, both poses fewer institutional threats and offers safeguards against agency abuses. "A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'"¹³⁶

Permitting courts to supervise the adequacy of agency's regulatory effort is hardly without hazard. The task is unmistakably connected with agency business, and the chance that an independent judicial reading will blunder through incomprehension, or intrude the judiciary into what is properly the agency's policy realm, is correspondingly increased. There is, as always, the sometimes difficult judicial obligation to respect Congress's assignments of responsibilities for decision. These responsibilities include allocating the agency's finite resources in support of its effort, and judges will often find it hard to identify or appreciate that resource constraint.¹³⁷

Particularly important, then, is that the reviewing court approach any question about the adequacy of an agency's drafting effort—whether it has done better than to produce "mush"—with an appreciation for the full task the agency faced. Litigation is a poor setting in which to attempt to understand the context in which challenged particulars have appeared to an agency. Parties present a particular detail of the regulatory scheme that has impinged on them. Avoiding a disproportionate response requires the court to attempt to see the issue in the frame of the agency's time and resources.¹³⁸ Just as procedural due process analysis must be "shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions,"¹³⁹ consideration of the adequacy of an agency's rulemaking effort must be shaped by the effort in general, not just some particular outcome about which complaint is later made. In *Hector*, for example, the adequacy of the Department's containment standard for big cats is better seen in the context of its full

135. See Manning, *supra* note 33, at 691-93.

136. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (citing Manning, *supra* note 33, at 655-57). See generally Strauss, *supra* note 130.

137. Cf. *Heckler v. Chaney*, 470 U.S. 821, 833-38 (1985).

138. Cf. *Vermont Yankee Nuclear Power Corp. v. NDRC*, 435 U.S. 519, 547 (1978).

139. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

complement of regulations under the Animal Welfare Act,¹⁴⁰ in which common species are provided for in much more detail, than as the isolated question, "Could the Department have done more *here*?" The answer to the isolated question will always be "Yes," yet a court finding a general effort to regulate in some detail ought more properly to understand the resource constraints and priority choices an agency will have faced, and to assess the adequacy of the particular regulation being challenged in that context.

Also essential is the acceptance of "standards" rather than "rules" as an adequate performance of the obligation to create sufficiently specific regulations. A standard, we can note, is precisely the kind of rule that is most familiar to, and comfortable within, the world of common-law precedent. Issues of negligence are issues about the behavior of "reasonable people." An individual facing liability for some past act or having to plan future conduct is not thought unfairly treated when her behavior is measured against this very generalized prescription—having attention, of course, to the detailed characteristics of her behavior in its context, as well as to the results that have been reached in applying the same standards to other congeries of fact. Nor is it thought unfair in any sense, that other juries and judges in other cases have had no more precise instructions, and that the parameters of her enforceable obligation emerge hazily and imprecisely from their practice.

One might again invoke a common-law analogy—one that seems to have figured in recent Court judgments in other contexts—for framing the issue here. Referring to common-law functions of judges, and attempting to suggest their limits, Justice Holmes once wrote:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*.¹⁴¹

Agencies, which do and must interpret, can be held to do so interstitially, confined from molar to molecular motions. When the Supreme Court rejected an FCC interpretation of statutory permission to "modify" rate-filing requirements that put in place a major deregulation,¹⁴² and FDA interpretations of "drug" and "device" that surprisingly extended its

140. 9 C.F.R. §§ 3.1-3.142. See *supra* text accompanying note 30.

141. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

142. See *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994).

regulatory authority to tobacco and cigarettes,¹⁴³ one could believe, it followed just such an impulse. But within proper realms of interpretation, additional procedural requirements have no place.

V. "RULES" EXPLICATING "STANDARDS"

Is it an independent problem that the inspector's manual underlying *Hector* departed from the standard-based approach of the regulation, and embodied a norm that we would recognize as a rule—eight feet? One can easily understand why, either in instructing its inspectors or in creating safe harbors for those it regulates, the Department would prefer to give exact parameters; the impulses are, respectively, to control the discretion of a distant employee in her dealings with the public, and to give the public the assurance of a clear definition. Waxing jurisprudential, Judge Posner seemed to find this shift troubling in and of itself, calling attention to the differences between courts, developing law case-by-case through precedent, and legislatures, and suggesting that the Department's instructions could not properly be called interpretive.

At the other extreme from what might be called normal or routine interpretation is the making of . . . rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it There is no way to reason to an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or a nine-foot fence or a ten-foot fence

The reason courts refuse to create statutes of limitations is precisely the difficulty of reasoning to a number by the methods of reasoning used by courts. *Hemmings v. Barian*, 822 F.2d 688, 689 (7th Cir. 1987). One cannot extract from the concept of a tort that a tort suit should be barred unless brought within one, or two, or three, or five years. The choice is arbitrary and courts are uncomfortable with making arbitrary choices. They see this as a legislative function. Legislators have the democratic legitimacy to make choices among value judgments, choices based on hunch or guesswork or even the toss of a coin, and other arbitrary choices. When agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes. The notice of proposed rulemaking corresponds to the bill and the reception of written comments to the hearing on the bill.¹⁴⁴

But, as Judge Posner quickly recognized, this approach is unsustainable. If it is preferable that rulemaking have the adjudicatory quality of announcing standards rather than rules, a staff's identification of a safe harbor in any scientific or technological matter will often have rulish

143. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

144. *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 170-71 (7th Cir. 1996).

qualities—it will set parameters that the staff have concluded meet the agency's standards.

Even in a nontechnical area the use of a number as a rule of thumb to guide the application of a general norm will often be legitimately interpretive. Had the Department of Agriculture said in the internal memorandum that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than eight feet would provide secure containment, and would therefore presume, subject to rebuttal, that a lower fence was insecure, it would have been on stronger ground. For it would have been tying the rule to the animating standard, that of secure containment, rather than making it stand free of the standard, self-contained, unbending, arbitrary.¹⁴⁵

“Self-contained, unbending” is the key; the agency tied the claim of violation not to the rule, but to the “interpretation.” To reason in that way is to abandon the hierarchical and malleable precedential model for the rigid and universally binding model of legislation. To have that effect on external worlds, private or judicial, the agency must act with the formality of notice-and-comment rulemaking or adjudication. But had it retained the standard as the ultimate basis for enforcement, no problem would have arisen from a choice to supplement that standard with an explanatory rule.

VI. RELIANCE, NON-ACQUIESCENCE, ESTOPPEL, AND OTHER CONFUSIONS

Now it seems appropriate to turn to the complicating issue of reliance, of investment-backed expectations. Hctor built his perimeter fence to six feet on the advice of the Department's local veterinarian. Is he not entitled to rely on that advice?¹⁴⁶ The stated facts, indeed, make it appear that the Department left him alone for eight years before asserting that he had not provided the required secure containment,¹⁴⁷ so perhaps it thought he was owed at least a certain amount of credit for his reliance. The low perimeter fence was but one of a range of violations it asserted, suggesting the possibility that his facility had become seriously deficient (or that he had encountered the misfortune of a throw-the-book-at-'im inspector). Note, however, that if we take this road we are binding the Department to an interpretation—the 1982 interpretation given to Hctor by its local veterinarian—with no sign that that interpretation ever acquired the dignity of departmental policy.

Similar issues also figure importantly in another recent decision about interpretive rules and policy statements that is otherwise quite hard to

145. *Id.* at 171.

146. A different question would be presented if one believed that the regulation, uninterpreted, simply failed to give the level of notice required to sustain an agency fine. See Manning, *supra* note 33, at 670 n.281.

147. See *Hctor*, 82 F.3d at 168.

understand. In *Alaska Professional Hunters Ass'n v. FAA*,¹⁴⁸ the question concerned interpretation of an FAA rule specifying the equipment required of commercial operators in aviation. In 1963, the Civil Aeronautics Board (CAB) had in agency adjudication interpreted the CAB's similar rule not to reach Alaskan hunting guides who flew clients on hunting excursions from their camps as part of tour packages.¹⁴⁹ FAA's Alaska regional office then began acting on the same interpretation of the FAA's rule. It never committed that interpretation to writing, and there is no indication that the FAA's national office knew of it. Beginning in 1990, the national office of the FAA began to study the matter, with informal input from the Association,¹⁵⁰ and in 1998 it published a notice announcing it would henceforth interpret its regulations to treat professional hunting guides, in Alaska as elsewhere, as commercial operators.¹⁵¹ The D.C. Circuit held that the regional office's prior practice constituted a "definitive interpretation" of the FAA regulations involved, and that since the FAA had already interpreted its regulations through the actions of its Alaska regional office, it could not reinterpret them without engaging in notice-and-comment rulemaking.¹⁵²

Note that two propositions are implicit here: first, a series of actions in remote agency offices, neither known to nor sanctioned by its central offices, can constitute a "definitive interpretation" of its regulations; and second, such an interpretation, once informally adopted, freezes the state of agency law, which cannot subsequently be altered without notice-and-comment rulemaking.¹⁵³

Does a policy that was never advertently adopted by any central office of the agency as a whole, formally or informally, count as agency law, that could be binding on anyone? To ask the question that way is to invoke yet another collection of confused and unsatisfactory pages about agency behavior. On the one hand, one can point to a number of private litigants' campaigns, generally unsuccessful, to discover a course of conduct that has developed here and there within an agency and then attempt to claim the benefit of this "secret law" on the basis of requirements of consistency.

148. 177 F.3d 1030, 1031 (D.C. Cir. 1999).

149. *See id.*

150. As here, the courts confronting publication rules appear not to notice, save perhaps for wonder or criticism, that publication rules seem often to be adopted after extensive discussions with affected groups, and after time intervals that could be thought at least an implicit recognition of reliance factors. Similar consultations preceded the EPA's rule challenged in the *Appalachian Power* case, that spawned the language quoted *supra* note 86.

151. *See Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1030-31.

152. *See id.* at 1034-36.

153. For a powerful criticism of this aspect of the case, reaching similar conclusions by a somewhat different route, see *Pierce*, *supra* note 12.

Associated with these failures is the hoary doctrine that an agency will not be estopped by the error of some functionary—farmer Merrill could not collect on his crop insurance, albeit he had paid the premium to a local officer of the Department of Agriculture, who had unconditionally accepted it. The understanding here is that government is large and complex, and its individual agents imperfectly controlled, humanly capable of error, even on occasion corrupt. Holding the government bound by the errors of its functionaries, even in individual dealings marked by strong reliance, would open too wide the doors of chicanery and adventitious dispute.¹⁵⁴ On the other hand, an agency that has consistently followed a given policy ought at the minimum, to explain the basis for any change.¹⁵⁵ The authority to make and implement policy, often to the substantial disadvantage of private individuals, carries with it an obligation of evenhandedness and demonstrable reason. Precedent should be followed, not only because we can usually assume, even if it would be hard to prove, that reliance has occurred, but also because of the public's interest in "the rule of law," the consistency and predictability of the legal framework over time.¹⁵⁶ In some circumstances, the propriety of reliance on the policy as it is even precludes changes that attach negative consequences to past, completed behavior.

From the perspective of the system of judicial precedent, the opinion of a single trial judge or coordinate judicial tribunal, even if not challenged by government attorneys, would not control the decisions of other trial judges or, particularly, appellate courts in subsequent cases. That police and prosecutors rarely stop people driving between 55 and 65 mph in a 55 mph zone, and that this fact leads a large number of drivers to set cruise control at 64 mph, does not preclude the possibility of police giving a speeding ticket for drivers going 64 mph—even if one could find a memo from the responsible chief enforcement officer instructing the police to not to pursue such drivers. Certainly we would not think that if the Commandant of the State Police discovered that Troop K, responsible for a distant and unpopulated part of the state, had a policy of arresting only people exceeding 85 mph, that made the speed limit in that part of the state, much less the whole state, 85—irrespective of how many citizens of Troop K's counties knew of its practice and had bought Lamborghinis. We would be concerned if we found patterns of, say, racial discrimination underlying

154. In direct dealings with individuals they have advised, many agencies find it useful to assure the reliability of their advice, and statutes also often provide a safe harbor *for those individuals*.

155. See, e.g., *Troy Corp. v. Browner*, 120 F.3d 277, 286-87 (D.C. Cir. 1997) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

156. My thanks to Todd Rakoff for forcefully making this point. See Rakoff, *supra* note 14.

differential enforcement; but absent such special circumstances, the speed limit for all of us would remain at 55—and it would remain there even if the occasional trial judge in Troop K's county acquitted a speeder charged with driving 70 mph. Should the FAA's position be any different?

This question, in turn, breaks into two parts: respecting past conduct, while the policy is in place, our response may be influenced by considerations of reliance, and the instincts about unfairness and bureaucratic regularity that attach to them. If the policy was widely known, however inappropriate, and if it was characterized by investment-backed expectations, then punishing behavior permitted by that policy raises questions for an agency (which *can* act prospectively) that are not faced by a court. Respecting future conduct, however, the only questions are about the modality of change. For Troop K's policy, never affirmatively adopted at Headquarters, at best known and tolerated, isn't it hard to imagine that more than an expression of disapproval is required? The agency has never acted in those modes that officially work to create agency "law." Even if we are willing to say that such law has in some sense accreted from conduct in the regions, trial judgments, and the like, treating that conclusion as the equivalent of formal agency adoption of the policy runs all the risks the conventional government estoppel doctrine stands against. When the D.C. Circuit says, as it did in *Alaska Professional Hunters*, that the FAA can alter the informal but longstanding policy of its Alaska regional office only by engaging in notice-and-comment rulemaking,¹⁵⁷ it stands conventional ideas about precedential systems on their head: now the hierarchical superior is "bound" by the actions of its inferior in a most powerful way—it is required to expend procedural resources to control the judgments of inferior offices who followed no procedure to adopt a position they had no authority to adopt.

As one who has sharply criticized the Supreme Court for its failure to respect the steady and uncontroversial accretion of law in the circuit courts of appeal,¹⁵⁸ I should be careful to distinguish between an obligation to identify and promulgate a preferred policy—to which, in my judgment, the FAA can properly be held—and an obligation to do so following procedures more formal than need have attended its initial formulation. If one interpretation of its enabling statutes and/or rules has come to be accepted, even in just a part of its domain, it can be held to announce and explain a new interpretation. But if that prior interpretation did not require notice-and-comment rulemaking to take effect, indeed was simply the

157. See 177 F.3d at 1034-36.

158. See Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436, 527-28 (1995).

product of lower-level inertia and practice over time, requiring the FAA to follow those procedures inflicts an unsustainable formality on the relationship between the FAA and its inferior offices. It empowers the regions, weakens the center, imposes a requirement of vigilance, of detailed oversight and control, with evident implications for how the agency expends its resources. Whatever might be the reliance equities of the particular individuals who were the beneficiaries of the initial action, it is hard to imagine a compelling case for placing the agency in such a procedural straightjacket.

Even when the first interpretation has come from national headquarters, a rule restricting the agency to one interpretive bite at the apple seems more likely to be the product of fears about *Chevron* or *Stinson* effects than sensible appreciation for the bureaucratic situation within the agency. There may of course be an obligation to explain, to justify, the agency's changed course,¹⁵⁹ but unless one believes the new course to be binding in a strong sense—to be capable of serving in and of itself as the basis for a determination of violation, to "bind" a subsequent reviewing court—such strait-jacketing of an agency's policymaking would be unsupported in either the APA or *Chevron*'s explicit recognition of the appropriateness of agency revisions over time. Indeed, one could imagine its impulse as being to suppress rather than to encourage agency interpretation. In an earlier decision from which *Alaska Professional Hunters* drew supportive dicta, powerfully criticized by Professor Pierce,¹⁶⁰ the U.S. Department of Justice had been silent about the interpretation it would give a regulation adopted under the Americans with Disabilities Act—whether it would interpret that regulation's requirement of unimpaired sight lines for wheelchair-bound sports spectators to include moments when the crowd had leapt to its feet or not. A stadium was sued after it built to the less expensive negative interpretation, the Department having subsequently taken the more demanding view. The demanding view prevailed, but only, the court said, because the Department had "never authoritatively adopted a position."¹⁶¹ Had it done so, "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine [the APA's rulemaking] requirements."¹⁶² This puts a high price indeed on ever giving interpretive advice.

Perhaps what this aspect of the two decisions draws on is the bromide expressing strong judicial reluctance to revisit issues of *statutory* interpretation, once they have been finally decided—the reluctance that

159. See, e.g., *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

160. See Pierce, *supra* note 12, at 563-66.

161. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997).

162. *Id.* at 586.

appears to drive Justice Scalia's dissent in *Mead Corp.* That, the courts have generally insisted, is Congress's business. A kind of conscious parallelism applied to rulemaking would hold, too, that once a rule had been "interpreted," its revision was for the legislature—that is, for rulemaking rather than further interpretation. But the parallel here is a false one—particularly as we see that what gets denominated an interpretation for these purposes need never have attracted the attention of national officials, may indeed only have been in effect in one remote region. Congress and the Court are co-equal branches of government, and the bromide is generally defended on bases that have at best imperfect agency analogs; the final interpretation that can have this judiciary-binding effect is *only* one that comes from the Supreme Court,¹⁶³ but agency interpretations can flow from a wide range of offices, perhaps (as here) never even taking written form. The bromide reflects the greater legitimacy of Congress over the courts as a source of national law, but there is no corresponding division in the world of the administrative agency—rather, general considerations of hierarchical authority which this approach tends to defeat. The bromide also assumes something about interpretation in relation to a statute, that it derives a compelled or logically justified position from the language it interprets, yet the very existence of section 552(a) of the APA, and also much judicial doctrine,¹⁶⁴ supposes that neither agency statutes nor agency regulations entail such singular meanings. Agency interpretations can change.¹⁶⁵

This brings us squarely back to the issues of reliance. At least two substantial difficulties would attend this approach. The first is that under

163. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 176-77, 185 (1994); see also Strauss, *supra* note 158, at 509-13; Cf. *Neal v. U.S.*, 516 U.S. 284, 290 (1996).

164. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64.

165. In the concluding paragraphs of his majority opinion in *Christensen*, almost as an aside, Justice Thomas included the following language, unaddressed in any other opinion:

But [strong deference to an agency's interpretation of its own regulation] is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. 529 U.S. 576, 588 (2000).

Of course, this observation assumes the continuing validity of the strong deference principle. Cf. Manning, *supra* note 33. Taken out of context, the language might seem to support the proposition that agency interpretations can occur only once; if they serve to concretize the regulation interpreted in a statutory not precedential sense, then a reinterpretation could be said to "permit the agency, under the guise of interpreting the regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. The trouble, to repeat, comes from the premise.

the standard, albeit often criticized, estoppel doctrine, *Hector* had no right to rely on the advice offered by a local official of the Department.¹⁶⁶ The second is that, even were the earlier advice the product of departmental policy—say, a prior edition of the inspector's manual—it is difficult to imagine a persuasive claim to more than “time to conform” (which *Hector* apparently had) for a change in interpretation grounded in safety, and which the agency was otherwise free to make. Suppose, in the nuclear context, that staff interpreting a Nuclear Regulatory Commission rule requiring containments for nuclear power plants to meet certain safety standards had expressed its opinion that welds of a certain description would satisfy that requirement. While that interpretation remains among the Commission's regulatory guidance, it provides a safe harbor for plant owners. Suppose, however, that subsequent events persuade the staff that its judgment was wrong, and that to meet the same standards a more elaborate weld is required. The owner of a plant who had invested millions in those welds would have to be afforded the opportunity to show that its welds in fact met the unamended standard; but it would no longer have any claim that it had satisfied the regulation just because it had satisfied the parameters of the first interpretation. Writings in this context imagine a balance between governmental and private interests, one unlikely to be resolved in a safety context by constructing an interminable, vested right to continue in a course now believed to be unsafe.¹⁶⁷ Perhaps for these reasons, Judge Posner in *Hector* attached no express value to reliance considerations, even though revealing in a variety of ways his considerable doubt about the safety merits.

CONCLUSION

An agency that well understood the approaches explored here would restrict itself to using its guidance, interpretive and policy documents in a precedential way. It would never claim for them the force that we associate

166. See *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990) (reaffirming *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947)). While the facts of both cases concerned claims on the Treasury, and the inappropriateness of such claims figured in the reasoning, *Office of Personnel Management v. Richmond* reserves as an open question only “[w]hether there are any *extreme* circumstances that might support estoppel in a case not involving payment from the Treasury” and observes broadly that “[a] rule of estoppel might create not more reliable advice, but less advice. . . . The inevitable fact of occasional individual hardship cannot undermine the interest of the citizenry as a whole in the ready availability of Government information.” 496 U.S. at 433-34 (emphasis added).

167. See Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653, 739-40 (1992).

with statutes—either when it was in court, or when it was dealing face-to-face with citizens. It would accept, even encourage, the appropriateness of citizen reliance on advice once given, defeating that reliance only in the face of demonstrably greater public need for change. Of course, this would not end all issues. The costliness of notice-and-comment rulemaking these days, if not responded to, will continue to generate pressure on agencies to attempt to do by indirection what they cannot afford to do as they should.

Yet fear of this phenomenon, however well-based, ought not to tempt the courts, as it unfortunately has, into locutions that discourage advice-giving or provoke agencies into accompanying their advice with warnings that it cannot be relied upon.¹⁶⁸ That is indeed a perverse teaching for the agency, and a perverse outcome for the public. The Supreme Court has told us, emphatically, that agency conclusions about enforcement priorities are, and for important reasons of state, as remote from judicial control as the actions of the administrative state can be.¹⁶⁹ Nonetheless, the D.C. Circuit has, and more than once, told an administrative agency that adoption and public explanation of an enforcement policy can only be achieved by notice-and-comment rulemaking.¹⁷⁰ These, too, are complicated questions, best left for full discussion elsewhere.¹⁷¹ What they have in common with today's question, in my judgment, is a certain confusion about what it means to interpret or to set a policy—a confusion also encouraged by our ideas about reliance, and by fear that propositions calling for respect for agency judgment entails judicial powerlessness in their face. Recalling *Skidmore*, the model of precedent, of influence rather than command, may serve to alleviate these concerns and reclaim for publication rules their intended, and valued, place.

168. *Cf. Hudson v. FAA*, 192 F.3d 1031, 1034 (D.C. Cir. 1999). In this case, an FAA policy was accepted, apparently because the agency had taken pains to show that it was "not in any way binding on the agency." *Id.* (emphasis added).

169. *See Heckler v. Chaney*, 470 U.S. 821, 830-35 (1985).

170. In *Chamber of Commerce v. U.S. Department of Labor*, 174 F.3d 206, 213 (D.C. Cir. 1999), the court found that OSHA was required to use notice-and-comment rulemaking to adopt a nationwide enforcement policy, which stressed inspection of sites that are unwilling to cooperate with voluntary, collaborative safety programs. OSHA had found, in state trials, that this policy significantly improved worker safety while reducing regulatory costs. *See id.* at 212. In *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946-49 (D.C. Cir. 1987), the court held that the FDA was required to use notice-and-comment rulemaking to set an "action level" for unavoidable contaminants in corn. The FDA had previously advised its inspectors and the regulated industry that it regarded enforcement below that level as inappropriate. *See id.* at 945, 948.

171. For an insightful discussion on these questions, see Titolo, *supra* note 11, and Thomas, *supra* note 11.